UNITED STATES TAX COURT
WASHINGTON, DC 20217

SHARI L. HART,	)	
	)	
Petitioner,	)	**CZ**
	)	
v.	)	Docket No. 19120-12 L.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	
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ORDER AND DECISION

This is a collection review action involving a proposed levy to collect petitioner's outstanding liability for trust fund recovery penalties in respect of multiple calendar quarters. Pending before the Court is respondent's Motion For Summary Judgment, filed December 11, 2012. Petitioner filed an Objection to respondent's motion on January 2, 2013, and supplemented her Objection on March 20, 2013.

Petitioner resided in the State of Kansas at the time that the petition was filed.

Background

On or about February 10, 2011, a revenue officer in respondent's collection division sent petitioner by certified mail a notice of proposed trust fund recovery penalty assessment (Letter 1153) regarding multiple calendar quarters. Letter 1153 provided petitioner with a pre-assessment opportunity to dispute respondent's determination that she was liable for trust fund recovery penalties as a responsible person of Miller & Midyett Realtors, Inc., who willfully failed to pay the

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company's employment taxes (so-called 941 taxes).[1] See I.R.C. sec. 6672. Letter 1153 stated in part as follows:

> Our efforts to collect the federal employment or excise taxes due from the business named above [Miller & Midyett Realtors, Inc.] have not resulted in full payment of the liability. We therefore propose to assess a penalty against you as a person required to collect, account for, and pay over withheld taxes for the above business.
>
> Under the provisions of Internal Revenue Code section 6672, individuals who were required to collect, account for, and pay over these taxes for the business may be personally liable for a penalty if the business doesn't pay the taxes. These taxes, described in the enclosed Form 2751, consist of employment taxes you withheld (or should have withheld) from the employees' wages (and didn't pay) * * * and are commonly referred to as "trust fund taxes."
>
> The penalty we propose to assess against you is a personal liability called the Trust Fund Recovery Penalty. It is equal to the unpaid trust fund taxes which the business still owes the government. * * *
>
> If you don't agree [with this penalty for each period shown], have additional information to support your case, and wish to try to resolve the matter informally, contact the person named at the top of this letter within ten days from the date of this letter.
>
> You also have the right to appeal or protest this action [to the local IRS Appeals Office]. To preserve your appeal rights you need to mail us your written appeal within 60 days from the date of this letter (75 days if this letter is addressed to you outside the United States). The instructions below explain how to make the request.

Form 2751 ("Proposed Assessment of Trust Fund Recovery Penalty"), which was enclosed with Letter 1153, identified 941 tax for 8 calendar quarters, namely, the fourth quarter of 2008, the 4 quarters of 2009, and the first 3 quarters of 2010.

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[1] The relationship of the trust fund recovery penalty to the collection of employment taxes is described in Mason v. Commissioner, 132 T.C. 301, 321-322 (2009).

Petitioner received Letter 1153 on February 14, 2011. She did not, however, appeal or protest to an IRS Appeals Office the proposed assessment of the trust fund recovery penalty for any calendar quarter. Accordingly, on May 30, 2011, respondent assessed the trust fund recovery penalty against petitioner for the second, third, and fourth quarters of 2009 and the first, second, and third quarters of 2010 (hereinafter, the six calendar quarters) and, on that same day, sent petitioner notice and demand for payment, i.e., a so-called statutory notice of balance due.[2] See I.R.C. sec. 6303(a).

Petitioner did not satisfy her outstanding liability. Accordingly, on October 18, 2011, respondent sent to petitioner by certified mail a Final Notice Of Intent To Levy And Notice Of Your Right To A Hearing (final notice) in respect of her trust fund recovery penalty liability for the six calendar quarters. Petitioner received the final notice on October 22, 2011, and responded by filing a Request For A Collection Due Process Hearing (Form 12153) with respondent's Appeals Office. In her Form 12153, petitioner challenged the existence or amount of her underlying liability, stating as follows:

> I feel that I am not responsible for this debt and should be removed from lien/levy. I was an employee of this company and not an officer. I had authorization to sign agent commission checks for the point of convenience. I did not have the authorization to make any decisions in regards to the accounts payable or bill payment process. That was the authority of Larry Midyett, * * * and * * *.

In her Form 12153, petitioner did not request a collection alternative in the form of an installment agreement or an offer-in-compromise.[3]

During the administrative hearing phase of this case, respondent's Appeals Office declined to consider petitioner's challenge to the existence or amount of the underlying liability, explaining in a letter dated March 22, 2012, as follows:

> You are not able to dispute the liabilities because the statute [I.R.C. sec. 6330(c)(2)(B)] states that the underlying issue may not be raised as an issue during a collection due process hearing unless the taxpayer did not receive

[2] The record does not disclose why respondent did not pursue the penalty for the fourth quarter of 2008 and the first quarter of 2009.

[3] Petitioner references a lien in her Form 12153. However, respondent represents that no lien has been filed, and the record does not include a copy of any notice of Federal tax lien. See I.R.C. sec. 6323; see also I.R.C. sec. 6320(a).

> any statutory notice of deficiency or did not otherwise have an opportunity to dispute the tax liability. Because you previously had an opportunity to dispute the balances owed, you cannot raise the issue during your hearing.
>
> This occurred when you were previously sent a Letter 1153, Notice of Trust Fund Recovery Penalty (TFRP), which was sent to you on February 10, 2011 via certified mail. Your certified notice was signed and received by you on February 4, 2011. This letter provided you your appeal rights and detailed instructions of that process. You had 60 days from the date of this letter to appeal these assessments. This was your prior opportunity to dispute the underlying tax liabilities; therefore you are precluded from raising the liability in the Appeals arena.

In May 2012, during the course of the administrative hearing phase of this case, petitioner obtained a default judgment against Larry Midyett, president of Miller and Midyett Realtors, Inc., in the principal amount of some $39,000 representing the approximate amount of her trust fund recovery penalty liability.[4] Petitioner requested that respondent forego, or at least delay, collection against her so that she could attempt to execute on her judgment against Mr. Midyett.

Respondent's Appeals Office declined to forestall collection and instead sent petitioner on June 29, 2012, a Notice Of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 (notice of determination) sustaining the proposed levy. Petitioner responded by commencing the instant action in this Court. See I.R.C. sec. 6330(d)(1).

In the petition, petitioner proposed that "she be allowed to execute on her judgment against Midyett, and then pay the judgment proceeds to the IRS to satisfy the TFRP [trust fund recovery penalty]." Petitioner also continued to challenge the existence or amount of her underlying liability.

After the case was at issue, respondent filed the Motion For Summary Judgment that is now before the Court. In respondent's Supplement, filed February 25, 2013, respondent acknowledges that petitioner's trust fund recovery penalty liability for the second quarter of 2009 has now been paid in full.

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[4] Also, at about the time petitioner commenced suit against Mr. Midyett, she obtained a statement from him in which he opined that she was not a responsible person within the meaning of I.R.C. sec. 6672.

In the Supplement, filed March 20, 2013, to her Objection, petitioner stated, inter alia, that she has not been successful in executing on her judgment against Mr. Midyett.

Discussion

1. Summary Judgment

Summary judgment serves to "expedite litigation and avoid unnecessary and expensive trials." Florida Peach Corp. v. Commissioner, 90 T.C. 678, 681 (1988). Either party may move for summary judgment upon all or any part of the legal issues in controversy. Tax Court Rule 121(a). The Court may grant summary judgment only if there are no genuine disputes or issues of material fact. Naftel v. Commissioner, 85 T.C. 527, 529 (1985).

Respondent, as the moving party, bears the burden of proving that no genuine dispute or issue exists as to any material fact and that respondent is entitled to judgment as a matter of law. FPL Group, Inc. v. Commissioner, 115 T.C. 554 (2000); Bond v. Commissioner, 100 T.C. 32, 36 (1993); Naftel v. Commissioner, supra. In deciding whether to grant summary judgment, the factual materials and the inferences drawn from them must be considered in the light most favorable to the nonmoving party. FPL Group, Inc. v. Commissioner, supra; Bond v. Commissioner, supra; Naftel v. Commissioner, supra. The party opposing summary judgment must set forth specific facts which show that a question of genuine material fact exists and may not rely merely on allegations or denials in the pleadings. Tax Court Rule 121(d); Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Grant Creek Water Works, Ltd. v. Commissioner, 91 T.C. 322, 325 (1988); King v. Commissioner, 87 T.C. 1213, 1217 (1986); Shepherd v. Commissioner, T.C. Memo. 1997-555. When the moving party has carried its burden, however, the party opposing the summary judgment motion must do more than simply show that "there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The party opposing the motion "may not rest upon the mere allegations or denials of his pleading, but * * * must set forth specific facts showing there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Where the record viewed as a whole could not lead a reasonable trier of fact to find for the non-moving party, there is no "genuine issue for trial". Matsushita Elec. Indus. Co. v. Zenith Radio Corp., supra at 587.

2. Hearings Under Section 6330

I.R.C. section 6331(a) authorizes the Secretary to levy upon property and property rights of a taxpayer liable for taxes who fails to pay those taxes within 10 days after a notice and demand for payment is made. I.R.C. section 6331(d) provides that the levy authorized in section 6331(a) may be made with respect to "unpaid tax" only if the Secretary has given written notice to the taxpayer 30 days before the levy. I.R.C. section 6330(a) requires the Secretary to send a written notice to the taxpayer of the amount of the unpaid tax and of the taxpayer's right to a section 6330 hearing at least 30 days before the levy is begun.

If a section 6330 hearing is requested, the hearing is to be conducted by the IRS Office of Appeals, and, at the hearing, the officer conducting the conference must verify that the requirements of any applicable law or administrative procedure have been met. I.R.C. sec. 6330(b)(1), (c)(1). The taxpayer may raise at the hearing "any relevant issue relating to the unpaid tax or the proposed levy". I.R.C. sec. 6330(c)(2)(A). The taxpayer may also raise challenges to the existence or amount of the underlying tax liability at a hearing if the taxpayer did not receive a statutory notice of deficiency with respect to the underlying tax liability or did not otherwise have an opportunity to dispute that liability. I.R.C. sec. 6330(c)(2)(B); see Montgomery v. Commissioner, 122 T.C. 1 (2004).

This Court has jurisdiction under section 6330 to review the Commissioner's administrative determinations. I.R.C. sec. 6330(d); see Iannone v. Commissioner, 122 T.C. 287, 290 (2004). Where the underlying tax liability is properly at issue, we review the determination de novo. Goza v. Commissioner, 114 T.C. 176, 181-182 (2000). Where the underlying tax liability is not at issue, we review the determination for abuse of discretion. Id. at 182.

a. Underlying Tax Liability

As previously discussed, a taxpayer may challenge the existence or amount of the underlying tax liability at an administrative hearing, and if so subsequently in a collection review proceeding in this Court, if the taxpayer did not receive a statutory notice of deficiency with respect to the underlying tax liability or did not otherwise have a prior opportunity to dispute that liability. I.R.C. sec. 6330(c)(2)(B). In the present case, respondent was not required to, and therefore did not, issue a statutory notice of deficiency because of the nature of the underlying liability, i.e., employment tax and trust fund recovery penalty. See I.R.C. secs. 6671, 6672; cf. I.R.C. secs. 6211-6215, defining deficiency

procedures. However, respondent did provide petitioner with written notice of the proposed assessment of the trust fund recovery penalty and afforded her the opportunity of challenging the proposed assessment by filing an appeal or protest with the local IRS Appeals Office. Inexplicably, although petitioner received Letter 1153 within a few days of its mailing, she did not appeal or protest the proposed assessment.

Section 301.6330-1(e)(3), Q&A-E2, Proced. & Admin. Regs., provides in pertinent part as follows:

> A taxpayer is entitled to challenge the existence or amount of the underlying liability for any tax period specified on the CDP Notice [Collection Due Process Notice, i.e., the final notice] if the taxpayer did not receive a statutory notice of deficiency for such liability or did not otherwise have an opportunity to dispute such liability. * * * An opportunity to dispute the underlying liability includes a prior opportunity for a conference with Appeals that was offered * * * before * * * the assessment of the liability. * * * [Emphasis added.]

The validity of this regulation was upheld in Lewis v. Commissioner, 128 T.C. 48 (2007).

Letter 1153 afforded petitioner a pre-assessment opportunity to challenge her liability for the trust fund recovery penalty. Unfortunately for petitioner, she did not do so. As a consequence, petitioner was precluded from doing so later on during the administrative hearing conducted pursuant to I.R.C. section 6330(c). In short, it was not an abuse of discretion for respondent's settlement officer to decline to consider petitioner's challenge.

b. Spousal Defenses and Challenges to the Appropriateness of Collection Action

Petitioner has not at any time raised any spousal defense, nor does any such defense seem potentially applicable in this case. Accordingly, the Court need not consider such matter.

Petitioner does challenge the appropriateness of the proposed collection action, i.e., the proposed levy. But this challenge is inextricably related to petitioner's "collection alternative", which is discussed immediately below.

c. Collection Alternatives

Petitioner has never sought a collection alternative in the form of an installment payment agreement or an offer-in-compromise. Rather, petitioner has sought forbearance by respondent in order to permit petitioner to execute on her default judgment against Mr. Midyett and presumably remit any proceeds to respondent.

The fact that petitioner secured her judgment in May 2012 but has yet to successfully execute on it might suggest that petitioner's "collection alternative" is not particularly realistic. But, regardless, the fact remains that under applicable law petitioner remains secondarily liable for the trust fund portion of the corporate taxpayer's employment taxes and that respondent, as creditor, is entitled to seek payment from petitioner and not wait for petitioner to secure possible payment from Mr. Midyett. After all, among the responsible officers, petitioner may be the one with the deepest pockets.

Finally, assuming arguendo that petitioner's proposal constitutes a collection alternative within the meaning of I.R.C. section 6330(c)(2)(A)(iii), and as may be relevant herein, the law is clear that the Commissioner may decline to consider a collection alternative if the taxpayer fails to submit current financial information (typically, a Collection Information Statement for Individuals (Form 433-A); or a Collection Information Statement for Businesses (Form 433-B)). See Orum v. Commissioner, 123 T.C. 1, 13 (2004) (the Commissioner is justified in not considering a collection alternative such as an installment payment agreement if the taxpayer fails to furnish current financial information), affd. 412 F.3d 819 (7th Cir. 2005); Montgomery v. Commissioner, 122 T.C. 1 (2004) (before any offer-in-compromise can be considered, the taxpayer must submit current financial information).

In short, respondent's Appeals Office did not abuse its discretion in rejecting petitioner's "collection alternative".

d. Verification of Procedures

It is well settled that no particular form of verification is required; that no particular document need be provided to taxpayers at a hearing conducted under section 6330; and that Forms 4340, Certificate of Assessments, Payments, and Other Specified Matters, and transcripts of account may be used to satisfy the requirements of section 6330(c)(1). Roberts v. Commissioner, 118 T.C. 365, 371

n.10 (2002), aff'd, 329 F.3d 1224 (11th Cir. 2003); Nestor v. Commissioner, 118 T.C. 162, 166 (2002); Lunsford v. Commissioner, 117 T.C. 183 (2001). The Forms 4340, transcripts, and materials that are attached as exhibits to respondent's motion, along with the statements of the settlement officer in the Attachment to the notice of determination, show that required assessment and collection procedures were followed.

Conclusion

In view of the foregoing, the Court concludes that there are no genuine issues of material fact and that respondent is entitled to judgment as a matter of law.

Finally, the Court notes that petitioner is not without a judicial remedy in the form of a refund action. However, such an action would lie in the appropriate United States District Court (see 28 U.S.C. sec. 1346(a)(1)) or in the United States Court of Federal Claims (see 28 U.S.C. secs. 1346(a)(1), 1491(a)(1)), but not in the Tax Court. See United States v. Clintwood Elkhorn Min. Co., 553 U.S. 1, 4, 11 (2008); see also Greene-Thapedi v. Commissioner, 126 T.C. 1 (2006); McCormick v. Commissioner, 55 T.C. 138, 142 (1970). In Bland v. Commissioner, T.C. Memo. 2012-84, at n.13, the Court, citing Flora v. United States, 362 U.S. 145, 170 n.37 (1960), and Davis v. United States, 961 F.2d 867, 870 n.2 (9th Cir. 1992), described how "it would be relatively easy for a similarly situated taxpayer [such as petitioner] to effectively obtain a prepayment judicial review of a sec. 6672 penalty assessment in a refund suit."

Premises considered, it is

ORDERED that respondent's Motion For Summary Judgment, filed December 11, 2012, is granted. It is further

[continued on next page]

ORDERED AND DECIDED that respondent may proceed with the proposed collection action (levy) in respect of petitioner's outstanding liability for the trust fund recovery penalty for the five calendar quarters remaining in issue (i.e., the third and fourth quarters of 2009 and the first three quarters of 2010), as determined in the notice of determination dated June 29, 2012, upon which notice this case is based.[5]

(Signed) Robert N. Armen, Jr.
Special Trial Judge

Entered: **MAR 26 2013**

[5] As a reminder, the Court notes that in respondent's Supplement, filed February 25, 2013, respondent acknowledges that petitioner's trust fund recovery penalty liability for the second quarter of 2009 has now been paid in full.